Supreme Court, U.S.
FILED
JUN 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1868

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PLAINS COTTON COOPERATIVE
ASSOCIATION OF LUBBOCK, TEXAS
Petitioner,

v.

GOODPASTURE COMPUTER
SERVICE, INC., et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS GOODPASTURE COMPUTER SERVICE, INC., WILLIAM JAMES GODLOVE, PETER H. CUSHMAN, AND CLARENCE MICHAEL SMITH

SCHUYLER B. MARSHALL*
JONATHAN W. RICHARDS
HAL R. RAY, JR.
Thompson & Knight
3300 First City Center
Dallas, Texas 75201
(214) 969-1700

COUNSEL FOR RESPONDENTS
Goodpasture Computer Service, Inc., William James Godlove, Peter H. Cushman, and Clarence Michael Smith

*COUNSEL OF RECORD

JAMES L. WHARTON
Jones, Trout, Flygare, Moody & Brown
1600 Civic Center Plaza
Lubbock, Texas 79401
(806) 765-8851

OF COUNSEL

June 19, 1987

QUESTIONS PRESENTED

1. Whether copyright protection of a computer program that is highly functional and significantly influenced by external market practices and factors should extend to the overall structure, sequence, and organization of the program?

2. Whether an applicant for a temporary injunction against an alleged copyright infringer must show irreparable harm when the opposing party introduces evidence demonstrating the absence of irreparable harm?

[Although Petitioner does not view Question 3 as meriting certiorari independently, Petitioner reserved the right to argue Question 3 in the event certiorari is granted on either of the preceding Questions.]

3. Whether the Court of Appeals must require the District Court to separately state its reasons for affirming the denial of a temporary injunction on trade secret and copyright claims, when Petitioner's presentation of its case to the District Court failed to delineate or distinguish between its copyright cause of action and its trade secret claim.[1]

---

[1] Fed. R. Civ. P. 52(b) provides: "Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for new trial pursuant to Rule 59." Petitioner failed to request additional findings of fact in accordance with Rule 52(b).

LIST OF PARTIES

In addition to the parties listed in the Petition, Goodpasture Computer Service, Inc. is a wholly owned subsidiary of Goodpasture, Inc. Goodpasture Export Corporation, a wholly owned subsidiary of Goodpasture, Inc., is Goodpasture Computer Service, Inc.'s only other affiliate.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	ii
LIST OF PARTIES	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
STATUTES INVOLVED	2
COUNTERSTATEMENT OF THE CASE	2
I. COURSE OF PROCEEDING AND DISPOSITION IN COURT BELOW	2
II. STATEMENT OF FACTS	4
REASONS WHY THE WRIT SHOULD NOT BE GRANTED	8
I. UNDER TRADITIONAL COPYRIGHT PRINCIPLES, PETITIONER FAILED TO SHOW A SUFFICIENT DEGREE OF SIMILARITY TO OBTAIN THE BROAD RELIEF SOUGHT	8
II. SIMILARITY OF STRUCTURE ORGANIZATION AND SEQUENCE WAS A CONTESTED ISSUE OF FACT THAT WAS CONSIDERED AND DECIDED BY THE DISTRICT COURT	10
III. IN REALITY WHAT PETITIONER SEEKS IS A DE NOVO REVIEW OF THE RECORD	12
IV. THE COURT SHOULD NOT CONSIDER FACT SENSITIVE ISSUES ON AN INCOMPLETE FACTUAL RECORD AT A PRELIMINARY STAGE IN THIS LITIGATION	13
V. ANY PRESUMPTION OF IRREPARABLE HARM IS REBUTTABLE AND WAS REBUTTED IN THIS CASE BY RESPONDENTS	15
CONCLUSION	17

TABLE OF AUTHORITIES

CASES:

Page

Apple Barrel Productions, Inc. v. Beard, 730 F.2d 384 (5th Cir. 1984) 15

Apple Computer, Inc. v. Formula International, Inc., 725 F.2d 521 (9th Cir. 1984) 15

Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed by agreement,* 464 U.S. 1033 (1984) 15

Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d (7th Cir.), *cert. denied,* 459 U.S. 880 (1982) 8, 15

Continental Casualty Co. v. Beardsley, 253 F.2d 702 (2d Cir.), *cert. denied,* 358 U.S. 816 (1958) 9

Educational Testing Services v. Katzman, 793 F.2d 533 (3d Cir. 1986) 15

Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464 (5th Cir. 1985) 3, 15

Hasbro Bradley, Inc. v. Sparkle Toys, Inc., 780 F.2d 189 (2d Cir. 1985) 15

Kepner-Tregoe, Inc. v. Carabio, 203 U.S.P.Q. 124 (E.D. Mich. 1979) 9

Kontes Glass Co. v. Lab Glass, Inc., 373 F.2d 319 (3d Cir. 1967) 15

Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 1485 (9th Cir.), *cert. denied,* 469 U.S. 1037 (1984) 8, 9

Peter Pan Fabrics, Inc. v. Martin Weiner Corp., 274 F.2d 487 (2d Cir. 1960) 14

Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977) 9

Page

Twentieth Century-Fox Film Corp. v. MCA, Inc., 715 F.2d 1327 (9th Cir. 1983) 9

United States v. Johnston, 268 U.S. 220 (1925) 12

Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222 (3d Cir. 1986), *cert. denied*, _____ U.S. _____, 107 S.Ct. 1877, 93 L.Ed.2d 831 (1987) 10, 13 n.4, 14 n.5

STATUTES:

17 U.S.C. § 102(b) 2, 13

OTHER AUTHORITIES:

M. Nimmer, *Nimmer on Copyright* (1986) 9

U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronic and Information* (April 1986) 12-13 n.4

No. 86-1868

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

PLAINS COTTON COOPERATIVE
ASSOCIATION OF LUBBOCK, TEXAS
Petitioner,

v.

GOODPASTURE COMPUTER
SERVICE, INC., et al.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS GOODPASTURE COMPUTER SERVICE, INC., WILLIAM JAMES GODLOVE, PETER H. CUSHMAN, AND CLARENCE MICHAEL SMITH

Respondents, Goodpasture Computer Service, Inc. ("Goodpasture"), William James Godlove ("Godlove"), Peter H. Cushman ("Cushman"), and Clarence Michael Smith ("Smith") (sometimes collectively referred to as "Respondents"), respectfully pray that the petition of petitioner, Plains Cotton Cooperative Association of Lubbock, Texas ("Plains"), for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on January 21, 1987, be denied.

STATUTES INVOLVED

17 U.S.C. §102(b). In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

COUNTERSTATEMENT OF THE CASE

I.

COURSE OF PROCEEDINGS AND DISPOSITION IN COURT BELOW.

On January 15, 1986, Plains Cotton Cooperative Association of Lubbock, Texas ("Plains"), filed suit against Goodpasture, Godlove, Richard R. Fisher ("Fisher"), Cushman, and Smith in the United States District Court for the Northern District of Texas, Lubbock Division. In its Original Complaint, Plains sought a preliminary injunction for alleged taking of trade secrets and other relief. Also on January 15, 1986, Plains filed a motion for expedited discovery, which the court granted. The court set Plains' application for a preliminary injunction for a hearing on February 7, 1986. On February 3, 1986, Plains amended its Complaint and added a cause of action for copyright infringement.

On February 7 and 10, 1986, just three weeks after service of process had been effected, the court held an evidentiary hearing on Plains' application for injunctive relief. The court subsequently received post-submission trial briefs and offers of proof from both sides on both the trade secret and copyright claims. The key issue was whether Respondents copied Plains' software. Plains' expert said yes; Respondents' expert said no; and, Respondents' other witnesses emphatically denied copying. Plains' evidence of organizational or structural sim-

ilarity was directly contradicted by testimony of Respondents' expert and other witnesses. Respondents offered testimony and exhibits demonstrating that fundamental differences in the hardware itself made copying useless and dictated major structural differences in the software systems. On February 17, 1986, the district court, apparently deciding Respondents' evidence was more credible, denied Plains' application for a preliminary injunction, explaining that Plains had not shown itself entitled to an injunction under the standard of *Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464 (5th Cir. 1985). Although the district court found that Plains presented insufficient proof on *each* of the elements required for a preliminary injunction, the court emphasized that Plains had especially failed to show irreparable harm or a substantial likelihood of success on the merits. Appendix at A-19.[2] On February 24, 1986, Plains filed its Notice of Appeal to the Fifth Circuit Court of Appeals.

Oral argument before the Fifth Circuit was presented to the Honorable Judges Thornberry, Johnson, and Williams on September 4, 1986. On January 21, 1987, the Fifth Circuit affirmed on two bases, one factual and one legal. First, the Fifth Circuit concluded that the district court's conclusion that Plains did not demonstrate a sufficient likelihood of success on the merits was not clearly erroneous. Second, consistent with long standing precedent in the Fifth Circuit, the Court of Appeals held that the district court's finding that Plains failed to demonstrate irreparable harm was not clearly erroneous. Appendix at A-9. On February 19, 1987, the Fifth Circuit Court of Appeals denied Plains' petitions for rehearing and rehearing *en banc.* Appendix at A-16.

---

[2] References to "Appendix" throughout this brief shall mean the appendix to Plains' petition herein.

II.

STATEMENT OF FACTS.

Plains is an agricultural cooperative association composed of approximately 20,000 cotton producers. In the 1970s, Godlove, Fisher, Cushman and Smith (collectively, the "Individual Defendants") worked as computer programmers for Plains and contributed to the development of "Telcot," Plains' electronic cotton marketing and accounting system. Telcot is designed so that each gin on the system is linked to a central mainframe computer at Plains' offices by dedicated telephone lines. All of the data used in the system is stored in the central computer, and the individual terminals located out in the field are "dumb" terminals. In addition to providing computerized marketing and accounting to its members through Telcot, Plains actively trades cotton for its own account over the Telcot system.

Plains never required any of the Individual Defendants to sign confidentiality agreements as a condition of their employment. Neither did Plains require any of the persons who received Telcot user manuals or who used the system to keep their knowledge of materials contained in the manuals or information they learned concerning the organizational structure of Telcot confidential.

In 1984, the Individual Defendants left Plains and began working for Commodity Exchange Service Co. ("CXS"), a computer service company whose president was Dan Davis, a former executive officer of Plains. CXS and Plains entered into a contract on July 5, 1979, in which the two entities shared in the operation of Telcot. On April 18, 1984, several days after three of the Individual Defendants started work at CXS, Plains gave written notice that it intended to terminate the contract. Subsequently, Plains and CXS agreed that the contract would terminate as of April 18, 1985. One of the provisions of this subsequent agreement was that Plains had an irrevocable

option, effective until April 18, 1986, to purchase from CXS for the sum of $125,000 "all micro-computer and mainframe communications software programs for the electronic marketing of cotton, on-line gin accounting and related gin programming packages which [CXS] develops" before that date. Plains has never exercised this option. CXS is not a party to this lawsuit. Although Plains contended that Respondents copied from CXS, Plains failed to demonstrate it has standing to assert any claim that might belong to CXS.

The Individual Defendants continued to work at CXS following its bankruptcy in March 1985 in an effort to help salvage the bankrupt corporation. The Individual Defendants worked with Dan Davis and helped prepare several conceptual design documents to be presented to prospective buyers of CXS to convince them to invest in CXS. These documents included preliminary descriptions of a personal computer-based system for use in the cotton industry. They were not, as Plains describes them, "comprehensive design documents" (Petition at 4) by any stretch of the imagination. This proposed system never was formally designed, and none of the computer code that makes up a computer system was ever written for the proposed system.

After filing bankruptcy, CXS approached Goodpasture, a computer service company based in Brownfield, Texas, about the possibility of its purchasing CXS's assets or managing CXS for a fee. Goodpasture considered CXS's management proposal at length, but no agreement resulted.

CXS last paid the Individual Defendants their salaries on or about June 15, 1985. After their paychecks bounced, they attempted to find work elsewhere. Plains would not hire them back, although it did offer Bill Godlove $30,000 to sign a non-competition agreement which he regarded as a "payoff" and refused.

Ultimately, each of the Individual Defendants was hired by Goodpasture and began, with two independent contract

programmers, a project to design and implement a personal computer-based cotton marketing and accounting system. The programmers drew on their knowledge of the cotton industry and expertise in computer programming and design gained over a number of years. They did not copy Telcot or any existing or previously proposed system, but instead independently designed the Goodpasture computer system, Goodpasture Electronic Marketing Systems ("GEMS").[3]

Although Plains' expert, Dr. Udo Pooch, claimed he saw similarities between the two systems which led him to believe that GEMS was copied from Telcot, he exhibited a great deal of ignorance of the cotton business and the transactions which Telcot and GEMS have computerized. He stated that he did not know the function of a cotton recap sheet. He did not know whether certain business requirements of the cotton industry might dictate the way information should logically be displayed on a computer screen. He did admit, however, that similarities in appearance of the Telcot and GEMS screens might be due to the fact that they present the same basic information. He also confessed that he had no idea how either Telcot or GEMS actually operated in the real world.

Respondents' expert witness, Mr. James B. Walker, who demonstrated a life-long knowledge of the cotton business, testified that GEMS was not copied from Telcot. He examined computer code from both systems and looked for signs of copying such as misspellings, illogical surplusage of language,

---

[3] The sole exception relates to the matters described in counsel's letter to the district court dated February 10, 1986. Defendant Richard Fisher approached counsel late on Friday, February 7, 1986, and advised for the first time that, contrary to his written employment agreement and repeated instructions by Goodpasture, he had taken a "shortcut" and had utilized a subroutine he found on a hard disk that had been obtained from CXS. He was promptly fired, and Goodpasture hired an independent programmer, "Stoney" Smith, to replace this routine in its entirety with one independently created by him. Mr. Smith testified in the trial court as to the work he did over the weekend, and other witnesses demonstrated that this subroutine was entirely eliminated from the Goodpasture system before the conclusion of the hearing.

and bad programming grammar. He stated that his opinion was that GEMS was not copied from Telcot. He noted that on a design level Telcot is a system with programs that do not flow smoothly, while GEMS has a distinctly coherent, "tight" structure. He also stated that he did not find that Telcot and GEMS were organized in a similar fashion.

Bill Godlove and Buddy Kelsay testified unequivocally that Respondents did not copy Telcot. They described in detail the process of creating GEMS from scratch. They also described the fundamental differences between the two systems which are so significant that Plains could not even copy its own mainframe software for use in a personal computer despite a major effort to do so. Extensive cross-examination by Plains' counsel afforded the trial court a unique opportunity to judge the credibility of the witnesses.

Respondents' Exhibits 60 and 61, which Bill Godlove discussed at length, set forth major conceptual, hardware, organization, data storage, and other differences between the two systems. These significant and substantial differences were not disputed. As Mr. Godlove explained, the result was that GEMS stores its data in substantially fewer files, different programs are necessary to access the data, the language the computers use is different, and fewer programs are required to accomplish the same functions. Indeed, Plains is now trying to create its own personal computer-based system similar to that developed by Goodpasture. Even though it has free access to all of its own programs, Plains' witness, Stu Childre, testified that the task is a major undertaking for Plains. This corroborates Respondents' position — not only was there no copying, but copying would be unavailing due to the fundamental differences in the two systems.

Plains' case rested entirely on Dr. Pooch, who was totally unfamiliar with the cotton industry and how industry practices might affect the organization of a computer system or logic in a computer program dealing with the marketing of cotton and the

accounting system required by cotton farmers and ginners. Dr. Pooch also stated that he has formed an opinion as to whether a particular computer system was copied on each of ten occasion when he was asked to do so, and in each case he rendered an opinion that supported the party who commissioned his work. Dr. Pooch admitted he does not select his clients and, therefore, theoretically his client's position on the issue of copying should be the correct one only half the time; however, he could not explain why his expert opinions always supported his clients. Indeed, this case turned on the district court's judgment as to the credibility of the witnesses.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

UNDER TRADITIONAL COPYRIGHT PRINCIPLES, PETITIONER FAILED TO SHOW A SUFFICIENT DEGREE OF SIMILARITY TO OBTAIN THE BROAD RELIEF SOUGHT.

The copyright law itself has long recognized that there are significant differences between different types of works. Those differences have been accommodated by variations in the scope of copyright protection accorded to the different types of works. *See Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) ("Degree of substantial similarity required to show infringement varies according to the type of work and the ideas expressed in it."); *Atari, Inc. v. North American Philips Consumer Electronics Corp.*, 672 F.2d 607, 616-17 (7th Cir.), *cert. denied*, 459 U.S. 880 (1982) ("That a work is copyrighted says very little about the scope of its protection").

At one end of the spectrum of protection, highly expressive and fanciful works, such as novels and poems, have received

the highest degree of protection, including protection for their nonliteral elements. *See, e.g., Twentieth Century-Fox Film Corp. v. MCA, Inc.,* 715 F.2d 1327, 1329 (9th Cir. 1983) (motion pictures). At the other end of the protection spectrum, works such as business and legal forms, recipes, and contest rules have received only the narrowest form of protection, often to the point of requiring literal duplication for infringement. *See, e.g., Landsberg,* 736 F.2d at 488 (description of game strategy); *Continental Casualty Co. v. Beardsley,* 253 F.2d 702, 706 (2d Cir.), *cert. denied,* 358 U.S. 816 (1958) (business forms); *Kepner-Tregoe, Inc. v. Carabio,* 203 U.S.P.Q. 124, 131 (E.D. Mich. 1979) (societal interest is in giving only narrow protection to works that teach or explain the useful arts so that many may offer the art in the market place); 3 M. Nimmer, *Nimmer on Copyright,* §13.03[A] at 13-39 (1984) ("[w]ith respect to commercial documents . . . the similarity probably must be more extensive than in the case of more artistic works in order to justify [infringement]"). *See also Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.,* 562 F.2d 1157, 1168 (9th Cir. 1977) ("the scope of copyright protection increases with the extent expression differs from the idea").

In this case, the district court properly concluded, consistent with traditional copyright principles, that the scope of Plains' copyright protection was relatively narrow due to the fact that practices in the cotton industry, which predated the advent of electronic digital computers by several decades, had a significant impact on the design of both parties' systems. The Fifth Circuit noted that "Respondents presented evidence that many of the similarities between the GEMS and Telcot programs are dictated by the externalities of the cotton market. . . . The record supports the inference that market factors play a significant role in determining the sequence and organization of cotton marketing software, and we decline to hold that those patterns cannot constitute 'ideas' in a computer context." Appendix at A-12.

II.

SIMILARITY OF STRUCTURE, ORGANIZATION, AND SEQUENCE WAS CONTESTED ISSUE OF FACT THAT WAS CONSIDERED BELOW.

Even if the Fifth Circuit had adopted the reasoning set forth in *Whelan Assoc., Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986), *cert. denied,* _____ U.S. _____, 107 S.Ct. 877, 93 L.Ed.2d 831 (1987), it is clear from the Fifth Circuit's opinion that the outcome in this case would still have been the same. Plains argued before the Fifth Circuit, as it does here, that similarity of organization, structure, and sequence was uncontroverted; in fact, the issue of similarity of organization, structure and sequence was a hotly contested issue on which the conflicting evidence was resolved against Plains.

In stark contrast to the assertions that Plains continues to make that GEMS is "virtually identical" (Petition at 3) or "highly similar" (Petition at 5) to Telcot, or that GEMS is or was intended to be a "Telcot 'clone'" (Petition at 5), Respondents introduced evidence that GEMS was significantly different from Telcot and that any similarities between the two necessarily resulted from the fact that the two systems were designed to perform basically the same calculations and functions. Respondents' expert testified concerning the differences in the overall structure and organization of the two programs. This testimony was corroborated by two other witnesses, Bill Godlove and Buddy Kelsay, who both testified that GEMS was not designed the way the Telcot system was and that GEMS was based on an entirely different design concept from that of Telcot. Respondents' witnesses further testified that (i) GEMS runs on different hardware, (ii) GEMS is written in a different programming language, (iii) GEMS is all on line and has no batch mode, (iv) GEMS requires less than half the programs required by Telcot, (v) GEMS stores data in less than half the files required by Telcot, (vi) GEMS provides functions that

Telcot does not and vice versa, (vii) Telcot's programs will not run unaltered on the type of equipment used in connection with GEMS, and (viii) Respondents had to invent control and system programs for GEMS that necessarily affected its application programs.

With respect to similarity of organization, structure, and sequence, the Fifth Circuit noted:

> A complete review of the record reveals testimony by several witnesses for appellees that the similarity between the two programs exists on a level not protected by appellant's copyright. Appellees' expert witness, James Bruce Walker, testified that appellees did not copy Telcot. In his opinion, appellant's programs were too large to have been copied and modified in the amount of time appellees took to create GEMS. Walker testified that appellees must have created the software based on their personal skills as computer programmers: "I believe they can take their knowledge of the cotton industry and repeatedly recreate a similar vehicle."
>
> Appellant argues that Mr. Walker was not competent to testify as to whether "copying" occurred because he did not look for organizational copying. The record reveals, however, that Mr. Walker simply was not familiar with the term "organizational" to describe copying on a level broader than verbatim, line-by-line copying. However, Mr. Walker did testify on direct examination that he compared the "overall structure of these programs," and on cross-examination that he "expanded his study" of the programs from the narrow search for verbatim copying. The district court was entitled to rely on both of these statements in interpreting Mr. Walker's expert opinion that GEMS was not "copied" from Telcot.

Appendix at A-7—A-8. Thus, the Fifth Circuit deferred to the findings of fact of the district court on the issue of "organizational" copying. This Court should not accept as facts what are, in reality, only Plains' contentions, which neither the district court nor the Fifth Circuit accepted.

III.

IN REALITY WHAT PETITIONER SEEKS IS A *DE NOVO* REVIEW OF THE RECORD.

The only real questions Plains raises in its Petition turn on the particular facts of this case alone and are of interest only to the parties to it. In essence, Plains asks this Court to make a third review of a complex factual record to see if it can find what two previous courts have been utterly unable to find—either proof of actual copying or sufficient similarity to justify the presumption of copying. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925). While Plains discusses interesting legal issues, they are simply not raised by the facts of this case, as found by the district court.[4]

---

[4] Indeed, Plains advocates a legal proposition that would extend copyright protection beyond the intent and policy of the Copyright Act and do great harm to this country's economy as a result. Of course, copyright protects against copying of unique source code, which is an arbitrary "expression" of the program. However, the ease of obtaining a copyright and the extended term of protection it provides renders protection beyond the source code very dangerous.

> If . . . courts continue to interpret the expression in computer programs as broadly as they have in recent cases, developers of computer programs may also be adversely affected. If copyright in computer programs is held to extend to the "useful knowledge"—the method of achieving certain results—embodied in the program structure or algorithms, copyright may block software innovators by precluding the creation of programs that differ in detail, but implement and perhaps improve on copyrighted programs. The patent system was designed to have this effect, but it is inappropriate for the copyright system, which was neither doctrinally nor administratively designed to protect functional information. Overly broad copyright protection would give the owner patent-like protection over processes for a much longer duration than patent law provides, and do so with no examination for the program's novelty or nonobviousness, as is required by patent law. Moreover, patent law requires that an invention be an advance over the "prior art," requiring an inventor to examine previously patented claims before

IV.

THE COURT SHOULD NOT CONSIDER FACT SENSITIVE ISSUES ON AN INCOMPLETE RECORD AT A PRELIMINARY STAGE IN THIS LITIGATION.

It is a well established principle of copyright law that copyright protection does not extend to "ideas", but only protects the "expression" of an idea. Section 102(b) of the Copyright Act provides: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work." 17 U.S.C. §102(b). As Judge Learned Hand explained, the dividing line between idea and expression is an elusive, fact specific concept

---

gaining patent protection. For this reason, the Patent and Trademark Office keeps records of all patents that have been issued. But the Copyright Office does not keep records of "prior art," which leaves no way of predetermining whether a program that performs similar functions or obtains similar results will infringe a previously copyrighted program.

U.S. Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* at 83 (April 1986).

Many programs incorporate ideas taken from (and indeed dictated by) industry practice, such as those involved in this case. To protect the "look and feel" of a program, as Plains demands, would enable the first to computerize and copyright an existing process or practice to block innovation, charge royalties and otherwise impede developments and innovation in the fast paced world of computer programming.

In *Whelan,* the court set up arguments it could knock down to reach its desired result. For example, by defining the "idea" as a computer system for the efficient operation of a dental laboratory, everything else thus became protectable "expression." However, the court in *Whelan* raised, but failed to answer, the principal policy argument against its liberal approach. While it quoted Sir Isaac Newton's remark "if I had seen farther than other men, it was because I had stood on the shoulders of giants," *Whelan,* 797 F.2d at 1238, n.33, it failed to recognize the result of its approach would be to outlaw the very means used by Sir Isaac Newton to achieve his wonderful contributions to society.

that will "inevitably be *ad hoc.*" *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).[5]

Plains' case is really nothing more than an attempt to protect the idea of a computerized cotton marketing system. Plains presented evidence of "algorhithmic similarities" (expert jargon for similar formulas); however, Plains' expert witness stated that he was not knowledgeable of the cotton industry or how the underlying requirements of the industry may have affected the structure of the system and its component programs. Standard industry computations could, of course, require the use of similar formulas in any marketing system. Certainly there are bound to be "algorhithmic similarities" between the two systems because they are both designed to perform basically the same calculations and functions.[6] The concept of a computerized cotton marketing system and various programs required to computerize the underlying business functions of classifying, offering, selling and keeping track of sales of cotton, however, is not protectable. These standard functions were highly developed long before the advent of computers. The similarities that were shown to exist in the case result from cotton industry requirements (*e.g.*, unprotectable "ideas") and not copying. Although Plains will have, at the final evidentiary hearing, another chance to persuade the district court on the expression/idea dichotomy, it is premature for this Court to enter into such a fact sensitive fray.

---

[5] Unfortunately, in *Whelan* the Third Circuit did not heed Judge Hand's admonition, but instead set about to establish a "bright-line" rule of its own, which provides absolutely no guidance and is totally unworkable. The court held: "[T]he purpose or function of a utilitarian work would be the work's idea, and everything that is not necessary to that purpose or function would be part of the expression of the idea." *Whelan*, 797 F.2d at 1236. This does not advance the matter any because it merely begs the question of how broadly (or narrowly) "purpose or function" should be defined in a particular case.

[6] For example, one function both systems perform is to compute the price of a given bale of cotton. The price of a bale of cotton is computed by multiplying the weight of the bale times the price per pound and then subtracting the storage charges. Because of the simplicity of many algorithms, "algorithmic similarities" are certain to occur between two computer programs that perform the same basic calculations.

V.

ANY PRESUMPTION OF IRREPARABLE HARM IS REBUTTABLE AND WAS REBUTTED IN THIS CASE BY RESPONDENTS.

In the petition, Plains characterizes the Fifth Circuit's holding as a "bold departure from established precedent." Petition at 25. However, the Court of Appeals' decision was entirely consistent with "established precedent" within the Fifth Circuit. *See, e.g., Enterprise International, Inc. v. Corporacion Estatal Petrolera Ecuatoriana,* 762 F.2d 464, 471 (5th Cir. 1985); *Apple Barrel Productions, Inc. v. Beard,* 730 F.2d 384, 386 (5th Cir. 1984).

Prior to *Apple Computer, Inc. v. Franklin Computer Corp.,* 714 F.2d 1240 (3d Cir. 1983), *cert. dismissed by agreement,* 464 U.S. 1033 (1984) a plaintiff's burden of showing irreparable injury varied inversely with the strength of its showing of a likelihood of success on the merits. *Kontes Glass Co. v. Lab Glass, Inc.,* 373 F.2d 319, 320-21 (3d Cir. 1967). Although the Third and other circuits have adopted a more liberal approach than the Fifth Circuit, they have not done away with the requirement of irreparable harm as a prerequisite to the granting of a preliminary injunction. Instead they reason "a prima facie showing of copyright infringement creates a *rebuttable* presumption of irreparable harm." *Educational Testing Services v. Katzman,* 793 F.2d 533, 543-44 (3d Cir. 1986) (emphasis added). The other cases cited on page 24 of Plains' petition also hold that only after a plaintiff has established a likelihood of success on the merits does a *presumption* of irreparable harm arise, and none of the cases hold that the presumption is irrebuttable. *See Hasbro Bradley, Inc. v. Sparkle Toys, Inc.,* 780 F.2d 189, 192 (2d Cir. 1985); *Apple Computer, Inc. v. Formula International, Inc.,* 725 F.2d 521, 525 (9th Cir. 1984); *Atari, Inc. v. North American Philips Consumer Electronics Corp.,* 672 F.2d 607, 620 (7th Cir.), *cert. denied,* 459 U.S. 880 (1982).

Even if the Fifth Circuit were to follow the lead of the Second, Third, and Seventh Circuits in this regard, it would not alter the results obtained below for two reasons. First, Plains failed to establish a liklihood of success on the merits so as to give rise to the presumption of irreparable harm. Second, Respondents introduced evidence sufficient to rebut a presumption of irreparable harm. Respondents introduced evidence that Goodpasture intends to target the marketing of its product to independent gins which are not members of Plains or any other co-op, while Plains markets exclusively to its members. Further, as the Fifth Circuit noted, even if a Plains co-op member sold cotton through the GEMS system, Plains would be contractually entitled to assess the co-op member a "sold around" charge, which would "ameliorate the risk that appellant will suffer financial harm if its customers use unlawfully competing cotton marketing software." Appendix at A-10. Further still, Respondents introduced evidence that Plains' damages, if any, are capable of calculation and that Goodpasture is solvent and capable of paying damages. On the other hand, Plains failed to introduce any evidence of irreparable harm, but instead insisted that irreparable harm is presumed and argued as if the presumption were irrebuttable.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: June 19, 1987.

Respectfully submitted,

SCHUYLER B. MARSHALL*
JONATHAN W. RICHARDS
HAL R. RAY, JR.

ATTORNEYS FOR
RESPONDENTS
Goodpasture Computer
Service, Inc.,
William James Godlove,
Peter H. Cushman, and
Clarence Michael Smith

THOMPSON & KNIGHT
3300 First City Center
1700 Pacific Avenue
Dallas, Texas 75201
(214) 969-1700

*ATTORNEY OF RECORD

JAMES L. WHARTON
Jones Trout, Flygare, Moody & Brown
1600 Civic Center Plaza
Lubbock, Texas 79401
(806) 765-8851

OF COUNSEL